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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 63

A. P. DICKSON, JOE DICKSON, I. N. CALVERT, C. T. DICKINSON AND ERNEST MILLER, PETITIONERS,

VS.

UHLMANN GRAIN COMPANY, A CORPORATION, RESPONDENT.

SUPPLEMENTAL ARGUMENT FOR RESPONDENT OPPOSING CERTIORARI.

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(Note: The paging of the record before and after certiorari was issued is different. In our original brief the references are to the paging in the old record; in this brief to the new. Some of the outstanding facts, stated briefly before, have been more fully developed and set down in the discussion to which they apply.)

ARGUMENT.

I.

Since Neither the Missouri Law nor Its Statutes Govern These Transactions, It Is Unnecessary for This Court to Decide Whether the Grain Futures Act Has Superseded Those Statutes.

Refusing all of plaintiff's requests (12-16), the trial court of its own motion, made a series of fact findings (16-19) declaring that in all of the transactions involved, plaintiff pretended to act as defendants' broker, pretended to execute purchases and sales for defendants on the Grain Exchanges of Chicago, Minneapolis and Winnipeg; that all of the transactions were fictitious, and that none were actually executed between clearing members of the Exchange; that in all of such transactions plaintiff "bet with its customers and took the other side of the deal." In other words, that court found as a fact that plaintiff was conducting a bucket shop in Carrollton, Missouri, was making bets with its own customers, the defendants, and merely going through the form of executing *bona fide* contracts on these Exchanges.

If these findings were warranted, the real agreements between plaintiff and defendants were a succession of gambling transactions which began and ended in the State of Missouri, were void everywhere, and were not sanctioned by the Grain Futures Act. If, however, plaintiff, employed by and acting as agent or broker for the defendants, entered into actual contracts for the purchase and sale of grain for future delivery on the Grain Exchanges of Chicago, Minneapolis and Winnipeg, then their validity is to be determined by the

law of the places where they were executed and to be performed, and the Missouri law does not apply. Only two transactions—a purchase closed out by an offsetting sale,—were executed in Missouri (48). These resulted in a profit to the defendant Calvert, which was paid to him and is not involved here. All of the others were for the purchase or sale of grain for delivery in Chicago, Minneapolis or Winnipeg and were executed on the Grain Exchanges there (48).

If these contracts were real and not simulated, then the Missouri Supreme Court concedes (*Edwards Brokerage Co.* v. *Stevenson,* 160 Mo. 516, 528) and the private international law of the land holds that their validity is not determinable by Missouri law. (See authorities, page 13, Respondent's Brief.) In Judge Van Valkenburgh's concurring opinion in the court below, he said (200):

> "In the first place the Missouri law is out of the picture, because it is conceded that none of the sales involved took place or were consummated upon the Kansas City Board of Trade * * *."

The trial court's findings are not only entirely unsupported by any evidence in the record, but are directly contrary to the documentary and oral testimony of plaintiff as to each transaction, which is not disputed by defendants, and contrary to the testimony of defendants themselves, and the admissions of their counsel in open court. Plaintiff's suits were for the recovery of commissions earned and advances made in behalf of defendants while acting as broker or agent for them. An itemized statement of the account was attached to each petition (3). On the trial, plaintiff introduced its ledger accounts with each defendant (35-42) and started to

prove their correctness by its records (44) showing each purchase and offsetting sale, which records it was explained (47).

> "represent and reflect the moneys which we paid out in excess of the moneys which we received covering the trades that we made for their account, plus our commission * * *. None of the items in these transactions represent any profit made by the Uhlmann Grain Company out of any loss by any defendant in any transaction."

The introduction of all of them was waived by defendants' counsel admitting the correctness of the accounts sued on, and that if the itemized statements were introduced in evidence, they "would prove the total of the amount sued on" (58, 59). Plaintiff's testimony, undenied, is that in the year 1924 (the period covering these transactions), it was in the grain brokerage business and a member in good standing of the Boards of Trade or Grain Exchanges of Chicago, Kansas City, Minneapolis and Winnipeg (30, 60). Its head office was in Chicago, with branch offices in Kansas City and Carrollton, Missouri. Each of the transactions in question was initiated by a defendant giving an order to plaintiff's local agent at Carrollton, which was transmitted by telegraph to plaintiff's office at Kansas City. These orders in every instance were for plaintiff, as broker or agent, to purchase or sell grain for future delivery for the account of the defendant on the Chicago, Minneapolis or Winnipeg Exchange. If the Kansas City office accepted the order, it was immediately telegraphed to plaintiff's Chicago office for execution. If the order was for Chicago wheat, it would be executed on the trading floor of the Chicago Board of Trade. If

the order covered Minneapolis or Winnipeg wheat, it was executed on the floor of that Exchange in the same manner. Plaintiff was a clearing member of the Chicago Exchange, and a non-clearing member at Minneapolis and Winnipeg. Only clearing members were permitted to contract, and in executing defendants' orders, plaintiff contracted in its own name on the Chicago Exchange, with another clearing member representing himself or his principal. The Minneapolis and Winnipeg orders were executed by and in the name of plaintiff's correspondent with another clearing member in which plaintiff's correspondent looked to plaintiff for performance (30-34, 43-52, 60-65, 70-75, 80-83, 102). Each of the contracts thus executed by the brokers or clearing members was immediately followed by an exchange of written confirmations (61-62) Plff's. Exs. 14-17, 63-64). Plaintiff's correspondents at Minneapolis and Winnipeg confirmed to plaintiff by telegram, contracts executed there (64). On the day that plaintiff received an order from defendants, which was accepted and executed, it would mail from its Kansas City office to the defendant in Carrollton a written confirmation of the order and its execution (31-33). That defendants received these confirmations following the execution of every order was admitted (44). These confirmations recited that plaintiff had on that day bought (or sold) for defendant's account at Chicago (Minneapolis or Winnipeg) the commodity contracted for, described the quantity, the delivery month, the article bought or sold and the price; that all transactions made by plaintiff for the defendant customer's account contemplate the actual receipt and delivery of the property and payment therefor, that all purchases and sales made by plaintiff for defendants were made in accordance with and

subject to the rules of the Board of Trade where made (33). Plaintiff, in turn, in executing defendants' orders on these Exchanges obligated itself (as did the other contracting broker) to make or accept delivery of the grain contracted for, to pay for the grain or to respond in damages for failure to do so. (See stipulation of counsel, 69, and rules of the Exchanges, 65-69). The rules of these Exchanges, however, also authorized and recognized the practice of offsetting purchases or sales in lieu of the actual delivery of the grain (Rule XXII, Sec. 6, 67). These rules also forbade bucket shop transactions or dealing in differences on the fluctuations of the market without a *bona fide* purchase and sale of the articles or an actual delivery (Rule XXIII, Sec. 8, Par. 1, 67). Plaintiff at all times maintained a large margin, aggregating several hundred thousand dollars, with the Clearing Association of the Chicago Board of Trade to secure the performance of each contract made by it for itself or on behalf of its customers (81-82, 134), and maintained a margin with its correspondent broker on the Minneapolis and Winnipeg Exchanges (82). It was personally obligated on each contract executed for defendants (52).

Defendants now contend (Suppl. Brief, 10) that the documentary evidence of plaintiff showing the course of dealing did not refer to any Carrollton customer. The statement is incorrect. See Plff's. Exh. 1, 31; Exh. 2, 33, identified p. 32. Exhibit 8, (45), is a copy (introduction of original waived, 44) of plaintiff's original record of a typical purchase and sale for the defendant, A. P. Dickson. Plaintiff's journal and ledger entries were made up from these sheets (47). In each transaction with defendants, similar records were made, and in each instance a copy was mailed to the defendant (44).

This was admitted in open court (44). Exhibits 8a and 8b, (45, 46-47), are typical confirmations mailed to defendant, A. P. Dickson, at Carrollton. It was admitted that such confirmations were sent out to each defendant in each instance on the execution of each order (44). Exhibit 9, (50a, 50b) is two telegrams, each dated August 19, 1924. The first is a telegram received at Chicago from Kansas City and initiating in Carrollton. It is an order to buy ten December Chicago wheat and to sell ten Winnipeg October wheat for the account of "CN9." CN9 means a Carrollton customer (31). It also shows the execution of both orders. The second is the telegraphic confirmation of the execution by plaintiff's Winnipeg correspondent of the Winnipeg order. The first telegram is an original order. That part of the order to buy Chicago wheat would be telephoned to the floor of the exchange and there executed (61). Plaintiff's Exhibits 14, 15 and 16 (63); Exhibit 17 (64); Exhibits 21, 22, 23 and 24 (71, 72, 73, 74) are typical written confirmations between plaintiff and the other contracting broker on the Chicago Exchange, and between plaintiff and its correspondent on orders executed on the Minneapolis and Winnipeg Exchanges. The latter group (Exhs. 21 to 24) give the names of the other contracting members at Minneapolis and Winnipeg. In connection with the introduction of these exhibits, defendants' counsel admitted (62) that similar documents were made up in the transactions had with defendants. Individual proof as to each transaction was waived (82).

When defendants admitted the correctness of each account sued on, that confirmations were received by them immediately on the execution of each order, that statements were sent to them at the conclusion of each purchase and sale, that the typical confirmations of transactions executed on the exchanges showing the

amount of grain contracted for, the price, the name and address of the other contracting party were representative of similar executions and the record thereof in the transactions with defendants; and when individual proof was waived, they should be and are estopped at this time to question the scope of that proof. In addition to this, the legal presumption is that the transactions executed on these exchanges were valid and complied with the rules of the exchanges and the law governing them. And the burden of proof was on the defendants to show the contrary. *Mullinix* v. *Hubbard,* 6 Fed. (2d) 109, 110; *Hoyt* v. *Wickham,* 25 Fed. (2d) 777, 780; *Thorn* v. *Browne,* 257 Fed. 519, 524-525; *Gettys* v. *Newburger,* 272 Fed. 209, 214; *Browne* v. *Thorn,* 272 Fed. 950, 952.

On every transaction which resulted in a loss, plaintiff, instead of profiting by that loss, actually paid it (51). Where the transaction resulted in a profit to the defendant, plaintiff mailed him a check for the amount (52). While it is true that none of these transactions resulted in an actual delivery of the grain contracted for, it is also true that in each instance they were satisfied or settled by offsetting purchases or sales before delivery date (146, 162-163); and such offsetting contracts were actually executed on the same Exchanges and in the same manner as the initiating purchase or sale (122).

Defendant Dickson, testifying for all of the defendants, on cross-examination said (151-152):

"Q. Did you understand that the Uhlmann Grain Company was to execute your orders for you?
A. Yes, sir.
Q. And act as your agent?
A. Yes, sir.

Q. In making these purchases?
A. Yes, sir.
Q. Either in Winnipeg or in Chicago, or both?
A. Yes, sir.
Q. And that these transactions were to be consummated on those markets; you understood that, Mr. Dickson?
A. Yes, sir.
Q. Then you understood that the contract to sell was the contract whereby the Uhlmann Grain Company, acting for you, agreed that during a certain month in the future that you would sell so many bushels of wheat?
A. Yes, sir.
Q. On this market?
A. Yes, sir."

Defendants' witness, T. H. Cramer, testified thus (146-147):

"Q. Now, whenever any of those contracts were entered into between you and as you say, Mr. McDonough, that you made a purchase, for instance, did you later make a sale against that purchase before delivery time came?
A. Yes, sir.
Q. Did that in every instance?
A. Always.
Q. Never did anything else?
A. No, sir.
Q. And when these purchases against sales were made they were made at your direction, were they?
A. Usually.
Q. And that was in accordance with your intention before you entered into these dealings, that was the way you intended to do it before, wasn't it?
A. What?
Q. That is to say, before the time of delivery arrived you were going to get rid of your contract,

that is the way you intended to do when you first started to deal with McDonough?
A. That is the instructions I gave to him.
Q. And he carried them out, didn't he?
A. Yes, sir."

These undisputed and conceded facts preclude as impossible, bucket shops, pretended transactions on these Grain Exchanges, and the idea that plaintiff and defendants were betting with each other on the rise and fall of the market. Indeed, the trial court itself did not really intend to so find, as is evidenced by this: Plaintiff submitted a series of requests for findings (12-16). Refusing all of these requests, the court took some of them, inserted the words "purported," "pretended," "fictitious," and made up its own findings from those requests (16-18). In its written opinion, the learned trial court said in part (180):

> "Its (plaintiff's) method of operation was to receive verbal orders for the purchase or sale of grain for future delivery on one of the markets of which it was a member. Such purchase or sale in every case involved future delivery. When a verbal order was given, plaintiff's branch manager transmitted such order to its office in Kansas City over the private wire. At that office the order was confirmed or rejected. The plaintiff, as agent for the defendant, then undertook to make the purchase or consummate the sale at one of the contract markets. Plaintiff's compensation was derived from commissions on the transactions."

The fact findings in the opinions of Judge Gardner and Judge Van Valkenburgh (186-189, 190, 194-195, 198, 199, 201) that plaintiff as defendants' broker con-

summated actual contracts on Grain Exchanges outside of Missouri, are in precise accord with the undisputed facts.

Notwithstanding the overwhelming concord of the evidence, defendants still insist that their orders and plaintiff's execution of them were pretenses, and they point to the testimony of the defendant Dickson that he told plaintiff's local agent at Carrollton that there was to be no delivery of the grain, and that the latter assured him that he would get him "out" of his contracts before delivery date (152). This testimony, even if accepted as true, affirms as real his contracts of purchase and sale, and the witness' own understanding of their binding character. If he had not understood that he was bound by his contracts to take or make delivery of the wheat within a certain time, he would not have been arranging for an offsetting purchase or sale before the arrival of that time. Not only by their testimony, but in their conduct, they proceeded under and not outside the terms of their written agreements. Under these contracts they were bound to take or deliver the grain. But those contracts were executed on exchanges whose rules and age-old practices permitted offsetting purchases or sales (Rule XXII, Sec. 6, 67). All of the confirmations sent to defendant following the execution of each order recited that each purchase and sale was made in accordance with the rules, regulations and customs of the Exchange on which they had been executed (30-33). These rules were part and parcel of each contract. *Wilhite* v. *Houston,* 200 Fed. 390 (C. C. A. 8); *Clews* v. *Jamieson,* 182 U. S. 461, 45 L. Ed. 1183; *Gettys* v. *Newburger,* 272 Fed. 209 (C. C. A. 8). When, therefore, defendants declared their intent not to take or deliver the grain, but to "get out" of that obligation by an

offsetting purchase or sale before delivery date, and when it appears that in every one of these transactions that is exactly what they did, the conclusion inevitably follows that they were proceeding in accordance with and not in disregard of their agreements. *Gettys* v. *Newburger, supra.* Even if their alleged arrangement with plaintiff's local agent at Carrollton had been to disregard their written agreements, and to make "bets" with plaintiff at Carrollton, the actual execution of binding contracts for them in every instance is conclusive that their unlawful intent was never carried out. Moreover, since McDonough had no authority to make contracts for plaintiff, it would seem to follow he had no authority to waive their provisions or change them.

Defendants rely on *State* v. *Christopher,* 318 Mo. 225, and contend that on facts substantially the same as those here, Christopher's conviction of a violation of the Missouri Bucket Shop Law was upheld. An examination of the facts *as found* by the Missouri Court reveals that Christopher was conducting a place in Sedalia, Missouri, where *pretended* sales on the Grain Exchanges of the country were permitted. The court there said (318 Mo., l. c. 237):

> "We take it, therefore, that the customers of the defendant bought in the manner described, in Sedalia, in violation of the statute; that actual buying and selling which he permitted and conducted did not take place on the Board of Trade of Kansas City or that of Chicago. That may have an important bearing as we examine the facts.
>
> It must be borne in mind that the Missouri statute does not forbid, nor does the indictment charge, the making or negotiation of sales or contracts, illegal or otherwise. Defendant is charged with keeping a place where he permits gambling in

common law. At common law a contract, which upon its face appears to be legitimate, cannot be declared void as a wagering contract upon proof that one only of the parties thereto knew and meant it to be such. Therefore, the arrangement for the purchase of the stocks in question, being legitimate upon its face, cannot be held void as a gambling contract in the absence of proof that both parties knew and understood that they were purchased for defendant upon margins, or upon the rise or fall of the stocks in the market."

In this Missouri case a broker was seeking to recover his commissions and advances. Plaintiff had purchased stocks for defendant on the New York Stock Exchange. On the trial the defendant contended and testified that he had no intention of taking the stocks and that plaintiff knew it. He offered no proof of a similar intent in the opposite parties to such contracts. In upholding a recovery for plaintiff, the Missouri Supreme Court (160 Mo., l. c. 524) approved this declaration of law:

> "'It must be shown by the preponderance of evidence that both defendant and the parties from whom plaintiff purchased said shares of stock intended there should be no delivery and that plaintiff so understood the matter at the time. In other words, it must appear from the evidence that the seller and the purchaser and the plaintiff understood it was to be a gambling speculation to be settled only by the payment of difference in the market price and that no shares of stock were expected to be delivered.'"

Other pronouncements of this rule are found in the authorities cited in the second paragraph, page 16, Respondent's Brief.

That defendants deposited margins with plaintiff is no evidence of a gambling intent. *Gettys* v. *Newburger*, 272 Fed. 209, 220. Nor is their testimony that they were not in a position to take or deliver the grain contracted for, where, as here, their declared intent and their act in each transaction were to satisfy their contracts by offsetting sales or purchases before delivery date. *Board of Trade* v. *Christie*, 198 U. S. 236, 248, 249.

The evidence is affirmative and there was none to the contrary, that in all of the purchases and sales on the Grain Exchanges of Chicago and Minneapolis that Section 4-(b) of the Federal Grain Futures Act was complied with in all respects (61-62, 75-79, 80-81, 90-95, 134-135). The sum of the matter then is that all of these contracts entered into by the defendants were valid at common law and the general law of the land; all were executed and performed without the State of Missouri; none have been declared unlawful by the Grain Futures Act. They stand sanctioned by the applicable law—the common law—whether or not Congress by the Federal enactment had entered and appropriated the field.

II.

The Contracts in Question, Executed by Plaintiff as Broker for and in Behalf of Defendants Upon Officially Designated Contract Markets, Are Valid and Enforceable Under the Federal Grain Futures Act.

For the purpose of this discussion, we assume as sound that which we deny—that the Missouri Legislature lawfully may and has declared that the typical futures transaction initiated by an order in Missouri but executed beyond its borders is nevertheless a Missouri

transaction, is a mere pretense and void in that State. The question is, has the Grain Futures Act superseded those Statutes in their application to the transactions in the instant case?

The Eighth Circuit in the case at bar, 56 Fed. (2d) 525, the Tenth Circuit in *Lyons Milling Co.* v. *Goffe & Carkener*, 46 Fed. (2d) 241, the Supreme Court of Kansas in *State ex rel.* v. *Rosenbaum Grain Co.*, 115 Kan. 40, and *Goffe & Carkener* v. *Henneberger*, 132 Kan. 211, and the Western District of Missouri in *Board of Trade* v. *Gentry, Attorney General* (a three judge decison, not officially reported, but copied as an appendix here) have answered the question in the affirmative. The Christopher case in Missouri, and King v. Horton in Ohio, contain language pointing to an opposite conclusion. The precise question here involved has not, we believe, been determined by this court. If the Missouri Statutes have been superseded it is because (1) Transactions in futures on Grain Exchanges so directly affect interstate commerce in grain that they are an integral part of such commerce and, therefore, subject to Federal regulation and control under the Commerce Clause (2) Congress has entered and appropriated the field (3) The Grain Futures Act has pronounced these contracts valid when executed in conformity with the Act; or at least preserved to them their validity at common law.

(1) Congress from the evidence before it had the power to find and declare that these transactions so directly affect interstate commerce as to become a part of it and, therefore, subject to Federal regulation and control. Their relation to and effect on interstate commerce, considered at great length in hearings when the Act was under consideration, were summarized in Sec-

tion 3 * of the Grain Futures Act, and fully considered in the opinion of this court upholding it as valid. *Board of Trade* v. *Olsen,* 262 U. S. 1, 67 L. Ed. 839. The growth and development of business and business methods have broadened the legal conception of interstate commerce to include those intrastate transactions which are a necessary incident to and therefore really a part of that commerce. In holding that these transactions in futures were of that class, this Court said in *Board of Trade* v. *Olsen, supra*:

> "This case was but the necessary consequence of the conclusions reached in the case of *Swift & Co.* v. *United States,* 196 U. S. 375, 49 L. Ed. 518, 25 Sup. Ct. Rep. 276. That case was a milestone in the interpretation of the commerce clause of the Constitution. It recognized the great changes and development in the business of this vast country, and drew again the dividing line between interstate and intrastate commerce where the Constitution intended it to be. It refused to permit local incidents of great interstate movement, which, taken alone, were intrastate, to characterize the movement as such. The Swift Case merely fitted the commerce clause to the real and practical essence of modern

* Sec. 3. "Transactions in grain involving the sale thereof for future delivery as commonly conducted on boards of trade and known as 'futures' are affected with a national public interest; that such transactions are carried on in large volume by the public generally and by persons engaged in the business of buying and selling grain and the products and by-products thereof in interstate commerce; that the prices involved in such transactions are generally quoted and disseminated throughout the United States and in foreign countries as a basis for determining the prices to the producer and the consumer of grain and the products and by-products thereof and to facilitate the movements thereof in interstate commerce; that such transactions are utilized by shippers, dealers, millers, and others engaged in handling grain and the products and by-products therein in interstate commerce as a means of hedging themselves against possible loss through fluctuations in price; that the transactions and prices of grain on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling grain and products and by-products thereof in interstate commerce, and that such fluctuations in prices are an obstruction to and a burden upon interstate commerce in grain and the products and by-products thereof and render regulation imperative for the protection of such commerce and the national public interest therein."

business growth. It applies to the case before us just as it did in Stafford v. Wallace."

See also *Stafford* v. *Wallace*, 258 U. S. 495, 66 L. Ed. 735; *Swift & Co.* v. *United States*, 196 U. S. 375, 49 L. Ed. 518; *United States* v. *Ferger*, 250 U. S. 199, 63 L. Ed. 936.

By these rulings and the declarations in the Act itself, dealings in futures are no longer intrastate but interstate transactions, having an important bearing and carrying an important part in the current of commerce of the nation in grain. The power to regulate interstate commerce includes the right to regulate transactions in grain futures which Congress has found and this court has declared to be a part of that commerce.

(2) How far Congress has entered the field previously occupied by State legislation depends upon the purpose of the Act and the scope of its provisions. The purpose, as its title discloses, was to regulate transactions on Grain Future Exchanges and prevent unlawful manipulation and control. It deals primarily with those transactions in grain futures which do not result in the delivery of the grain, but which are satisfied by offset. Mr. Chief Justice Taft, who wrote the opinion of this court upholding the Act, said of it (262 U. S. 1, 36):

> "It is not the sales and deliveries of the actual grain which are the chief subject of the supervision of Federal agency by Congress in the Grain Futures Act * * *. It is the contracts of sales of grain for future delivery, most of which do not result in actual delivery, but are settled by offsetting them with other contracts of the same kind, or by what is called 'ringing.' *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236, 246, 247, 49 L. Ed. 1031, 1037, 1038, 25 Sup. Ct. Rep. 637."

The only means by which this could be accomplished was for Congress to take over completely to itself and to the Federal Government the power and right to regulate *all transactions in futures on Grain Exchanges throughout the United States.* It adopted that means. The idea expressed in the opinions of the Missouri and Ohio courts that Congress undertook to regulate these contracts only on Federal contract markets, proceeds upon an entire misapprehension of the provisions of the Act itself. By Section 4 * it is made unlawful (among other things) to execute futures contracts which (as Section 3 declares they do) are *or may be* used for hedging purposes in interstate commerce or for determining the price basis of any transaction in interstate commerce, unless the seller at the time the contract is executed is the actual or potential owner of the grain, or unless such contract is made by or through a member of a Board of Trade which has been designated by the Secretary of Agriculture as a contract market.

In other words, Congress has prescribed that these transactions shall be conducted only on Federal con-

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Sec. 4. It shall be unlawful for any person to deliver for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication any offer to make or execute, or any confirmation of the execution of, or any quotation or report of the price of, any contract of sale of grain for future delivery on or subject to the rules of any board of trade in the United States, or for any person to make or execute such contract of sale, which is or may be used for (a) hedging any transaction in interstate commerce in grain or the products or by-products thereof, or (b) determining the price basis of any such transaction in interstate commerce, or (c) delivering grain sold, shipped, or received in interstate commerce for the fulfillment thereof, except—

(a) Where the seller is at the time of the making of such contract the owner of the actual physical property covered thereby, or is the grower thereof, or in case either party to the contract is the owner or renter of land on which the same is to be grown, or is an association of such owners, or growers of grain, or of such owners or renters of land; or

(b) Where such contract is made by or through a member of a board of trade which has been designated by the Secretary of Agriculture as a "contract market," as hereinafter provided, and if such contract is evidenced by a record in writing which shows the date, the parties to such contract and their addresses, the property covered and its price, and the terms of delivery: Provided, That each board member shall keep such record for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct, which record shall at all times be open to the inspection of any representative of the United States Department of Agriculture or the United States Department of Justice.

tract markets and by and between clearing members thereof, and has forbidden as unlawful all such transactions on any other Grain Exchange in the United States. If this construction is correct, then the completeness with which Congress has entered and appropriated the field is at once apparent. By the laws of many of the states and by the common law of the land, dealings in futures wherein the parties contemplate offsetting purchases and sales rather than actual delivery of the grain, are valid. But Congress, upon the predicate of the national public welfare and in the exercise of its police power over the interstate commerce of the nation, has found and declared that such contracts shall be made only on the floors of a few of the great national marketing places of the nation, and under the supervision and control of a Federal Department. The Act has gone further (Section 4) by inhibiting the initial steps leading to the execution of those contracts, by forbidding the transmission through the mails or by interstate telegraph, telephone or other means of an offer to execute such a contract or confirmation of its execution or a quotation of such transaction, unless it relates to a contract executed on a contract market in the manner prescribed. A system of regulation, comprehensive and complete, governing all such transactions conducted on contract markets is prescribed. The Act did not stop there. It gave over to the Federal Department of Agriculture complete supervision of the exchanges themselves. No Grain Exchange in the country may permit these transactions unless it is a contract market. No such exchange may become or continue to function as a contract market without the consent of the Secretary of Agriculture. He may suspend or debar it from operation. He may and has prescribed regulations for

their operation. The jurisdiction of the Agricultural Department extends to the members of these exchanges. The rulings of the Department and the conduct of the exchanges and of its members are subject to direct review by the Federal Courts. In fine, Congress, finding that the nationwide practice of dealing in futures as commonly conducted on Boards of Trade by the public generally, directly affects interstate commerce and is affected with a national public interest, has placed the persons dealing in them, their contracts, the steps leading to their execution, their execution and the places where they are executed under Federal sovereignty and control. If this power has been constitutionally exercised under the Commerce Clause, then it is certain that the infinite variety of State regulation dealing with the same subject has been suspended.

In *Western Union Telegraph Co.* v. *Boegli*, 251 U. S. 315, 64 L. Ed. 281, this court said:

> "As the result of doing so, we are of opinion that the provisions of the statute bringing telegraph companies under the Act to Regulate Commerce, as well as placing them under the administrative control of the Interstate Commerce Commission, so clearly establish the purpose of Congress to subject such companies to a uniform national rule as to cause it to be certain that there was no room thereafter for the exercise by the several states of power to regulate, by penalizing the negligent failure to deliver promptly an interstate telegram, and that the court below erred, therefore, in imposing the penalty fixed by the state statute."

In *Pennsylvania Railroad* v. *Public Service Commission of Pennsylvania*, 250 U. S. 566, 63 L. Ed. 1142,

the Public Service Commission of Pennsylvania made regulations concerning the size of rear platforms of cars on all trains moving in the state. The Interstate Commerce Commission has made similar regulations covering the same subject, but which were different from those of the state. This court said:

> "The subject-matter in this instance is peculiarly one that calls for uniform law, and in our opinion, regulation by the paramount authority has gone so far that the statute of Pennsylvania cannot impose the additional obligation in issue here."

United States v. *Hill,* 248 U. S. 420, 63 L. Ed. 337. In this case Congress passed an Act forbidding the transportation of intoxicating liquor into a state where the manufacture or sale of such liquor for beverage purposes was permitted. By the particular state law, it was not unlawful for an individual to bring liquor into the state for personal consumption. Hill carried a quart of liquor on his own person from Kentucky to West Virginia on an interstate interurban car. He was convicted of violating the Federal Act notwithstanding the state legislation into which the liquor was brought permitted his act. The court said (l. c. 425, 340):

> "Congress may exercise this authority in aid of the policy of the state, if it sees fit to do so. It is equally clear that the policy of Congress, acting independently of the states, may induce legislation without reference to the particular policy or law of any given state. Acting within the authority conferred by the Constitution, it is for Congress to determine what legislation will attain its purposes. The control of Congress over interstate commerce is not to be limited by state laws. Congress, and not the states, is given the authority to regulate inter-

state commerce. When Congress acts, keeping within the authority committed to it, its laws become by the terms of the Constitution itself the supreme laws of the land. 'This is not to say that the nation may deal with the internal concerns of the state, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere.' Minnesota Rate Cases (*Simpson* v. *Shepard*) 230 U. S. 352, 399, 57 L. Ed. 1511, 1541, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18, and previous decisions of this court therein cited. * * * (341) When Congress exerts its authority in a matter within its control, state laws must give way, in view of the regulation of the subject-matter by the superior power conferred by the Constitution."

See also *Napier* v. *Atlantic Coast Line*, 272 U. S. 605, 71 L. Ed. 432.

It cannot be that these transactions continue to be subject to the varying public policies of the states. There is no such thing in our law as divided control over interstate commerce, once Congress has spoken. The famous language of *Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. Ed. 23 is apropos. In his concurring opinion, Mr. Justice Johnson said of the power to regulate commerce:

"* * * It can reside in but one potentate; and hence the grant of this power carries with it the whole subject, leaving nothing for the states to act upon."

In Section 3 of the Grain Futures Act, Congress on proof before it, found that transactions in futures as commonly conducted on Boards of Trade are carried on in large volume by the public generally and by persons engaged in buying and selling grain in interstate commerce; that the prices involved are generally quoted and disseminated throughout the United States and in foreign countries as a basis for determining the price of grain moving in interstate commerce, and to facilitate such movements; that they are utilized by shippers, dealers, millers and others engaged in handling grain in interstate commerce as a means of hedging themselves against possible loss through fluctuations in price. It also found that such transactions could be and sometimes were used for the sinister purpose of unduly inflating or depressing prices, and declared all such transactions unlawful unless executed on a contract market designated as such by the Secretary of Agriculture. The State of Missouri has provided that no transactions for the sale of grain for future delivery shall be valid unless both parties to that agreement contract and intend that it shall terminate in an actual delivery of the grain. The Missouri legislation and the Congressional Act cover precisely the same field and are in conflict. Both cannot prevail. That open conflict touches the vitals of this case. The Federal Act recognized and said that these transactions perform a useful function in our national commercial life, but that they also may be productive of evil to the nation's commerce. And it proclaimed a national public policy which was to permit them but to restrict their operation to a few exchanges which would be under the supervision and control of the Federal government. The Missouri Statute calls them fictitious transactions and forbids them altogether, de-

clares them invalid. Congress could have forbidden them. And if from the evidence before it, the conclusion had been reached that they were detrimental to the commerce of the nation in grain, such a finding would have been in Section 3 and they could and would have been prohibited. But the finding was in effect that, when properly carried on, they are as direct a benefit to interstate commerce as unlawful practices in their use are a burden. These recitals in Section 3 were neither a Congressional fiat, as so characterized by the Missouri Court, nor a mere political declaration as defined by the Ohio Court. They were of that degree of importance and reality that on them rested the constitutionality of the Act itself. *Board of Trade* v. *Olsen,* 262 U. S. 1; *Hill* v. *Wallace,* 259 U. S. 44. Those same findings removed them from the field of state regulation into the realm of the commerce of the nation where they belong. They are the result of years of study and investigation. They represent and declare an uniform national public policy concerning transactions in grain futures. No one can read Section 3 and continue to believe that Congress regarded them as other than lawful transactions when properly conducted. Nor can Section 4 be read and the conclusion be escaped that Congress intended to and did draw them into the exclusive dominion of Federal rule.

In the debates before the House, Mr. Tincher, one of the authors of the bill said (Congressional Record, June 26, 1922, 9404):

> "There is a legitimate trade in the sale of wheat for future delivery, and there is a legitimate trade in hedging, and the legitimate ends of the grain trade are not opposed to having the manipulation put out of the market."

Mr. Wells of the Minneapolis Board of Trade, appearing before the House Committee on Agriculture, considering the Grain Futures Act, said:

> "Future trading to be of any benefit and have any economic value requires a volume of trade. It requires the presence in the market of individuals, traders, other than those who are directly and constantly engaged in the handling of grain. Unwittingly, very likely, but actually those traders take the part of underwriters. They underwrite the risk of fluctuation in price."

Their economic value and commercial usefulness in interstate commerce in grain are recognized by Mr. Justice Holmes in *Board of Trade* v. *Christie,* 198 U. S. 236. Speculation in grain futures may offend the moral sense of some. Nevertheless, it is no longer open to debate that they tend to equalize prices, afford a cushioning influence on rapid price fluctuations, sometimes avoid, or at least mitigate catastrophies, enable the miller, the storer of grain, the exporter and even the farmer to escape completely the hazard of future price fluctuations. This is accomplished by hedging, which would not be possible except for the huge volume of trades in futures as commonly carried on by the public generally on grain exchanges. They make a broad, liquid market, a market for all grain. They insure uniformity in price throughout the Union.

In the *Christie Grain Case,* 198 U. S. 236, 247, 248, 49 L. Ed. 1031, 1038, Mr. Justice Holmes said:

> "People will endeavor to forecast the future, and to make agreements according to their prophecy. Speculation of this kind by competent men is

the self-adjustment of society to the probable. Its value is well known as a means of avoiding or mitigating catastrophes, equalizing prices, and providing for periods of want. It is true that the success of the strong induces imitation by the weak, and that incompetent persons bring themselves to ruin by undertaking to speculate in their turn. But legislatures and courts generally have recognized that the natural evolutions of a complex society are to be touched only with a very cautious hand, and that such coarse attempts at a remedy for the waste incident to every social function as a simple prohibition and laws to stop its being are harmful and vain."

The testimony of Mr. Griffin, President of the Chicago Board of Trade, given in hearings before the joint committees of the House and Senate, when the Act was under consideration, is copied into the record in this case (128-129). He said:

"Sometimes the word 'speculator' is used in a sinister sense—as the equivalent of 'gambler.' This is incorrect. The distinction between gambling and speculation is recognized by all economists and equally by all thoughtful persons. The risks of a speculator are those which are inevitably incident to the ownership of property. The gains and losses of a speculator are those which are incident to actual changes of value. On the other hand, the risks of a gambler are incident to nothing—such risks are purely self-created. The gains and losses of a gambler do not depend on changes of value—the gains of one gambler depend upon nothing except the losses of another."

The purchase and sale of grain for future delivery and the practice of offsetting them before delivery date

by repurchases and resales is a part of our marketing system. The vast volume of these transactions and the fact that the general public of the United States deals in this form of contract, known to the world, was also known to Congress.

Congressman Rainey of Illinois, a member of the House Committee on Agriculture which considered this bill before its passage, said in the Congressional debates (Congressional Record for June 26, 1922, 9410):

> "The present grain marketing system was no sudden invention. It did not come into being all at once; it is the product of evolution, of the irresistible economic law. It represents today the best elements of all the marketing systems of all the ages."

Upon full consideration of the entire situation and of all of the facts, Congress announced a policy of permitting and utilizing these transactions for the good they do, and of regulation for the harm they may do. The problem was legislative and that of the national legislature exclusively. Until Congress otherwise declares, it is not for the courts nor the legislatures of the states to say that they are illegal.

If the Missouri Statutes and the laws of the other states of the Union touching the validity of these transactions continue to govern them, the purpose and entire scheme of the Congressional Act have been frustrated and destroyed. In Illinois (*Board of Trade* v. *Christie*, 198 U. S. 236, 249), and in all states where the common law has not been changed, these contracts are valid. By the Federal Act they and all steps leading to their execution are declared unlawful unless executed on Fed-

eral contract markets, and in conformity with Federal requirements. If the laws of those states have not been superseded, then the avowed and obvious purpose of Congress of restricting them to Federal contract markets has failed of accomplishment. If the Federal regulation and control includes only contract markets, the law is a bootless gesture. If the Act does not supersede the Illinois law as to the validity of these contracts, then the Chicago Board of Trade could completely escape its provisions by the simple expedient of withdrawing as a contract market. It has that right under the express provisions of Section 7 of the Act. On the other hand, if it reaches and supersedes the law and public policies of Illinois and other states in its class, it also displaces and supersedes that of Missouri.

The Board of Trade of Kansas City, a contract market, is next in size and importance to the Chicago Board of Trade. Last year its volume of business in actual grain receipts was greater than that of Chicago. The great volume of futures transactions handled on the Kansas City exchange is used by shippers, growers, producers, millers, elevator operators and others in hedging their contracts against future price fluctuations. The Missouri law is in force on all such contracts executed within its borders even on the Kansas City contract market, it is as much a burden and obstruction to interstate commerce as the unlawful manipulation of futures denounced by the Act itself. In last analysis, these Missouri Statutes nullify the Grain Futures Act in Missouri or the Grain Futures Act nullifies them.

In *Railroad* v. *Hefley*, 158 U. S. 99, this Court said:

> "The carrier cannot obey one statute without sometimes exposing itself to the penalties pre-

Pages 31 & 32 missing

It is too much to contend that such state legislation stands even though it conflicts with the Federal law.

If this Missouri legislation, passed under its police power, is still in force to invalidate these transactions, then the Missouri Legislature and that of any other state can validate them and thereby override the Congressional Act in its entirety.

We address ourselves to the reasoning and conclusions of the Missouri and Ohio Courts in those cases upon which defendants rely. The Missouri Court analyzes the Grain Futures Act in the *Christopher Case*, 318 Mo. 225. It holds (l. c. 243-244) that the Act did not forbid future trading in general and only sought to regulate it on contract markets. Upon that construction the court rested its conclusion that existing State legislation remains unaffected. The language of the Act disproves that construction. Section 4 provides that:

> "It shall be unlawful for any person to deliver * * * (through the mails or by other interstate means) any offer to make or execute, or any confirmation of the execution of * * * any contract of sale of grain for future delivery *on or subject to the rules of any Board of Trade in the United States, or for any person to make or execute such contract of sale,* which is *or may be* used for (a) hedging any transaction in interstate commerce, grain or the products or by-products thereof, or (b) determining the price basis of any such transaction in interstate commerce, or (c) delivering grain sold, shipped, or received in interstate commerce for the fulfilment thereof except— * * * (d) where such contract is made by or through a member of a Board of Trade which has been designated by the Secretary of Agriculture as a 'contract market.'"

Congressman Tincher in presenting the bill to the House was careful to say (Congressional Record, June 26, 1922, p. 9406):

> "Section 4 of the bill deals not only with futures which are, but also with those which may be used in connection with actual transactions in interstate commerce."

The court ruled that the Act reaches and governs only those futures transactions which are used to ship grain from one state to another or to hedge such contracts. It thereby misconceived the entire Act, its findings and its purpose. It is the vast volume of future trading which directly affects actual movements in interstate commerce, which are used to facilitate such movements, the prices and quotations of which influence and fix actual prices of the grain moving in such commerce, that the Act was designed to cover. *Board of Trade* v. *Olsen*, 262 U. S. 1, 36, 67 L. Ed. 839, 850. To hold that the Act singles out for regulation and control only the particular transactions which are so used is to ignore everything that is within the Act and behind its passage. The great volume of future transactions provides the means for hedging. Any one of them may be used for that purpose. If the Missouri Court's construction is sound, then the unlawful manipulation of futures which the Act was designed to prevent may proceed unaffected by it.

The Missouri Court rules that the futures transaction which does not contemplate or result in an actual shipment in interstate commerce is an intrastate transaction and beyond the power of Congress to regulate. In the *Olsen case*, 262 U. S., l. c. 36, 67 L. Ed., l. c. 850, this court said:

"The sales (futures) on the Chicago Board of Trade are just as indispensable to the continuity of the flow of wheat from the West to the mills and distributing points of the East and Europe as are the Chicago sales of cattle to the flow of stock toward the feeding places and slaughter and packing houses of the East.

* * * (39, 851) More than this, prices of grain futures are those upon which an owner and intending seller of cash grain is influenced to sell or not to sell, as they offer a good opportunity to him to hedge comfortably against future fluctuations.

* * * (41, 852) Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it. The Board of Trade conducts a business which is affected with a public interest and is, therefore, subject to reasonable regulation in the public interest. The Supreme Court of Illinois has so decided in respect to its publication of market quotations. * * * In view of the actual interstate dealings in cash sales of grain on the exchange, and the effect of the conduct of the sales of futures upon interstate commerce, we find no difficulty under *Munn* v. *Illinois*, 94 U. S. 113, 133, 24 L. Ed. 77, 86, and *Stafford* v. *Wallace*, 258 U. S. 495, 66 L. Ed. 735, 23 A. L. R. 229, 42 Sup. Ct. Rep. 397, in concluding that the Chicago Board of Trade is engaged in a business affected with a public national interest, and is subject to national regulation as such."

The Missouri Court finally narrows the compass of the Act thus (318 Mo., l. c. 246):

"* * * the Act does not regulate, forbid nor make lawful any contract for future deliveries unless the contract is made on a contract market."

The Act declares unlawful every such contract not executed on a contract market. It puts a padlock on every other futures exchange in the country.

The court (244) quotes from Section 4 and concludes that the Act touches and forbids only such offers to execute such contracts and confirmations thereof as are transmitted through the mails or in interstate commerce by telegraph or other means (244). The transactions at bar were initiated and confirmed in that manner. Every order initiated in Carrollton was transmitted by telegraph to Kansas City and immediately relayed by interstate telegraph to Chicago, Minneapolis or Winnipeg. All confirmations were transmitted by United States mail from Kansas City to Carrollton. Thus the Missouri Court concedes that all of the transactions at bar are for these reasons alone, included within the operation of the Federal law and excluded from that of the Missouri Statutes.

The conclusion of the Missouri Court (l. c. 247) is that the effect of the Grain Futures Act is to restrict the operation of state laws so as to make them inapplicable to transactions conducted on a Federal contract market. The transactions at bar fall within that class.

In the concluding paragraph of the opinion, the court deplores the Act which it fears permits speculation in futures to flourish in all of the states and renders powerless the effort of the state to stop them. The answer is that the Federal law has laid a blanket of prohibition over the country by declaring them to be unlawful throughout the Union except where they are carried on at places permitted by and under the supervision of Federal law.

The right to execute these contracts on Federal contract markets is the constitutional right to engage in

interstate commerce which no State statute can forbid or impair.

In the Ohio case, *King* v. *Horton*, 116 Ohio St. 205, 156 N. E. 124, as in the Missouri case, all of the contracts were initiated and concluded within the borders of the state, and counsel conceded that the transactions constituted a violation of the State Bucket Shop Law. In the case at bar, all of them were executed outside of Missouri and our contention has been and is they are not affected by the Missouri Statutes. *Gordon* v. *Welles*, 222 Mo. App. 609, 616; *Claiborne Commission Co.* v. *Stirlen*, (Mo. App.) 262 S. W. 387, 389.

It is to be noted that the Ohio case (156 N. E., l. c. 127) concedes that the Act forbids dealings in futures on all grain exchanges in the country except designated Federal contract markets.

The court found as a fact that the records required by the Act were not made or kept (l. c. 128); and that the contracts were for that reason unenforceable. It was held that the memorandum showing the names of the parties to the contracts, required by the Act, was faulty because the evidence developed that the other names appearing upon the memoranda were those of brokers and agents. Defendants here rely upon this ruling and that of the Missouri Court for their contention that the Act was not complied with in the instant case. The memoranda which plaintiff at bar kept, gave the names and addresses of the clearing member on the other side of the transaction who might be acting for himself or for an undisclosed principal. Both brokers, of course, kept a record of the name and address of the customer for whom they were acting, which could always be had on request. The rules of the respective exchanges and the requirements of Section 4 (b) of the

Act require that all contracts executed on the exchanges shall be made by or through a clearing member. Neither the Act nor the departmental regulations required the brokers to disclose to one another the names of their principals (See Statement of Facts, Respondent's Original Brief, 5-7). The parties to these contracts whose names were required to be recorded were the ones who had the right to make the contracts on the exchanges—its clearing members. In *Thorn* v. *Browne*, 257 Fed. 519 (C. C. A. 8), approved by this court in *Browne* v. *Thorn*, 260 U. S. 137, 67 L. Ed. 171, Judge Sanborn said (l. c. 525):

> "Counsel for the defendant urges other, but less serious, objections to the slips which were offered in evidence. He contends that they are insufficient under the Cotton Futures Act: * * * (2) Because the names and addresses of the buyers and sellers are not set forth in the slips, but the buyers and sellers in the contracts under consideration were the New Orleans brokers, whose names and addresses appear on the slips. None but members of the Cotton Exchange could buy or sell cotton futures thereon. The statement of their names and addresses was no less a compliance with the statutes because they bought or sold for undisclosed principals, and the statute nowhere requires the disclosure in the contracts of the names or addresses not disclosed to opposing parties of the principals or others for whom the brokers make contracts the burden of which they personally assume."

Nevertheless, in the case at bar, the records of both brokers in whose names the contracts were executed, showed the names and addresses of their principals. The Act does not require that the broker furnish

his customer with the name of the other broker or his principal. That information is for the Secretary of Agriculture and the record here shows that the requirements of the Act and the regulations of the Departments and the rules of the Exchanges were strictly observed in each instance (See Statement of Facts, Original Brief, 5-7).

The opinion holds (128) that since the contracts executed for the customers were carried in the names of their brokers on the Exchange that the parties were merely dealing in margins, that is, that the ordinary futures transactions executed on an exchange through broker members satisfied by offsetting purchases and sales in the same manner are mere pretended transactions. With this conclusion, this court does not agree (Authorities, pp. 15-16, Respondent's Original Brief). It is also ruled that futures transactions are no part of interstate commerce, and that Congress may not arbitrarily so declare (129), that (128) the findings and declarations of Section 3 are "purely political and in no sense legislative," that "those declarations add nothing to the Act * * *." The ruling of the Olsen case is to the contrary. As in the Missouri case, the court found also (129) that the plaintiff broker, King & Company, took the other end of the deal and expected to profit by its own customer's loss.

In the end, the expressed views of the Missouri and Ohio Courts on the Grain Futures Act are in the nature of *dicta,* for the decisions actually rested upon findings that the broker and customer were betting with each other, that the broker expected to profit by his customer's loss, and that the Grain Futures Act was not complied with.

Defendants contend (Supp. Brf. 42-43) that the Grain Futures Act declared unlawful the contracts executed on the Winnipeg Exchange. Obviously, neither the Grain Futures Act nor the Missouri statutes could affect the validity of those transactions. Defendants offered no proof that they were invalid under the Canadian law, and the burden was of course on them (Resp. Orig. Brf. 14).

The contention that plaintiff did not segregate the Winnipeg items from the others wrongfully assumes that the burden rested upon plaintiff to prove that they were not invalid. Defendants alleged that all were invalid, and the burden to prove that charge never shifted. *Hoyt* v. *Wickham*, 25 Fed. (2d) 777, 780.

(3) If, since the passage of the Grain Futures Act, the Missouri Statutes no longer apply so as to invalidate futures contracts executed on Federal contract markets, in conformity with Federal law, it is immaterial whether the Federal Act expressly or impliedly declares such transactions valid. They are valid by the common law, and even under the Missouri law, except as they may be invalidated by the Statutes. However, since Congress has expressly declared that all of these transactions are unlawful unless executed on a Federal contract market and in compliance with Federal law, it must follow that contracts executed in conformity with the Statutes are valid by virtue of this very declaration in the Act itself. Putting the language of the Act conversely, it at least declares this much: It is lawful to execute a futures contract by or through a member of an exchange which is a contract market, if it is executed in compliance with the Federal law.

That language is a license to execute such contracts under certain conditions. It is incredible that Congress

intended that any State Statute can continue to forbid that which Congress within its power has expressly permitted.

The Act recognized the use and value of futures to interstate commerce. That recognition carried the plain inference that they were regarded as lawful. The fact that Congress regulated rather than forbade them is persuasive of that intent. The fact that the regulation encompasses and includes every futures exchange in the United States, by forbidding the execution of any such contracts other than on contract markets, and the completeness with which Congress took over the regulation not alone of the contracts themselves, but also of the exchanges and the members thereof, precludes the idea that they were to remain valid or not as the law of the particular state provided.

In the court below, Judge Gardner said (192):

> "It was manifestly the intention of Congress to legitimatize and make lawful transactions, dealings, and contracts in grain futures in which the provisions of this Act were complied with. Having made it unlawful for any person to engage in such transactions unless within the exceptions specified, it seems necessarily to follow that where the transaction comes within the exceptions specified, and has met and complied with all the requirements provided in the statute, such transactions are valid."

In *State ex rel.* v. *Rosenbaum Grain Co.*, 115 Kan. 40, 48, the court said:

> "The grain futures act does not prohibit speculation. It recognizes speculation as lawful, and one of the patent purposes of the act was to protect,

as an insurance expedient, that form of speculation known as hedging."

Whether the Act expressly or impliedly declares these transactions to be lawful when executed on contract markets, it appears certain that it recognized them as valid. It would not have permitted that which it regarded as unlawful. It may also be assumed that Congress knew when the Act was passed that this court had expressly held in the Christie Grain Case that the ordinary futures transaction, which is satisfied by offset or counter-purchase and sale, is valid. It was therefore entirely unnecessary again to proclaim that which had already been decided and settled by the Supreme Court of the United States. The language of the Act which declared these transactions into the field of interstate commerce, subjected them to Federal law. This also, Congress knew. Under that law, and the common law of the land, they are valid.

From the foregoing contentions, it is respectfully submitted that the findings and decision of the learned Court of Appeals are correct, and that plaintiff was rightfully adjudged to be entitled to recover.

Respectfully submitted,

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APPENDIX.

IN THE DISTRICT COURT OF THE UNITED STATES.

For the Western Division of the Western District of Missouri.

BOARD OF TRADE, *et al.*,

Plaintiffs,

v. In Equity No. 714

NORTH T. GENTRY, *et al.*,

Respondents.

[Before Van Valkenburgh, Circuit Judge and Otis and Reeves, District Judges]

MEMORANDUM OPINION.

Per Curiam:

The Supreme Court in *Stafford* v. *Wallace*, 258 U. S. 495, has announced:

> "Commerce among the states is not a technical legal conception but a practical one, drawn from the course of business. (*Swift & Co.* v. *United States*, 196 U. S. 375.)
>
> "Streams of commerce among the states are under the national protection and regulation including subordinate activities and facilities which are essential to such movements though not of interstate character when viewed apart from them."

This doctrine, applicable to stock yards and live stock dealers, has been extended to dealing in grain

by the Grain Futures Act and has been so characterized in *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, the court holding that such dealings are susceptible to speculation, manipulation and control affecting cash prices and consignments "is such as to cause a direct burden on the interference with interstate commerce therein rendering regulation imperative for the protection of such commerce and the national public interest therein," and, therefore, Congress "had power to provide in the Grain Futures Act for placing grain boards of trade under federal supervision and regulation as 'contract markets', as a condition to dealing by their members in contracts for future delivery."

Pursuant to the provisions of the Act, and of this interpretation thereof, the Kansas City Board of Trade has been designated as a contract market; and, therefore, all transactions therein concerning trading in grain futures have been placed under the regulation and control of Congress; in other words, the United States, through Congress, has entered and appropriated this field.

This being so, the entire subject-matter has been entirely removed from state regulation and control, and this means, of course, in every particular and aspect. Prior to the passage of the Grain Futures Act the matter involved in the Missouri statute was admittedly within state control and this act was, therefore, expressly upheld in *State* v. *Brodnax,* 228 Mo. 25, and by the Supreme Court under the same title in 219 U. S. 285. The passage of the Grain Futures Act however, entirely changed the situation. This principle is distinctly recognized in *State* v. *Railroad,* 212 Mo. 658. The only question deserving consideration is whether the Missouri Act complained of is a regulatory act distinct from a

mere incidental exercise of the police power without such attribute. The Supreme Court of Missouri in *State* v. *Brodnax, et al., supra,* distinctly recognizes it as such. Furthermore, the act itself, in terms, undertakes to prescribe certain requirements of the board in the matter of keeping of records, forbidding the keeping of any such place of exchange unless such requirements are met; the written or printed memoranda of sale directed to be issued being subject to a stamp tax of twenty-five cents each. Substantially similar records are required to be kept by the Federal Act. The Missouri statute can not be viewed exclusively as imposing an excise or occupation tax because it does not affect the entire range of activities of the Board of Trade; it merely pertains to grain futures—those transactions over which Congress has assumed supervision and control; but if viewed as an excise or stamp tax as a prerequisite to or privilege of engaging in such operations, or any other operations within the purview of federal legislation, it would, of course be equally objectionable. Such Board of Trade cannot have a dual or divided regulation even though the two are not in terms necessarily inconsistent and conflicting. However, as said by counsel for complainants:

> "Where Congress, pursuant to its power to regulate commerce, has authorized a particular act or occupation, the states may not thereafter impose conditions to the exercise of the act or occupation which Congress has authorized. Thus, where Congress has authorized a particular occupation, the states may neither prohibit, tax, nor otherwise regulate such occupation."

The situation is the same where Congress has substantially entered and appropriated a field theretofore

controlled by the state. The decisions of the Missouri and Kansas courts are in harmony with these conclusions.

Brodnax v. *Missouri*, 228 Mo. 25;
Sells v. *Railroad*, 266 Mo. 155-184;
State of Kansas, ex rel. v. *Rosenbaum Grain Co., et al.*, 115 Kans. 40.

The result, in our judgment, is that the temporary injunction should go, as prayed, in conformity with the general provisions of the preliminary order of Judge Reeves; the same to remain in effect until the further order of the court.